Filed 7/1/15 P. v. Gomes CA1/1

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>TYLER LEWIS GOMES,<br>Defendant and Appellant. | A138703<br><br>(Solano County<br>Super. Ct. No. FCR292769) |

Defendant Tyler Lewis Gomes appeals his convictions for sodomy and oral copulation of a person under 18 years old and unlawful sexual intercourse with a minor more than three years his junior. Defendant argues the trial court abused its discretion by admitting evidence of prior acts of sexual misconduct and domestic violence. We disagree and affirm.

## I. BACKGROUND

Defendant was charged by information with six counts of forcible rape (Pen. Code, § 261, subd. (a)(2)), two counts of sodomy by use of force (*id.*, § 286, subd. (c)(2)), six counts of forcible oral copulation (*id.*, § 288a, subd. (c)(2)), two counts of assault by means likely to produce great bodily injury (*id.*, § 245, subd. (a)(1)), one count of criminal threats (*id.*, § 422), one count of false imprisonment by violence (*id.*, § 236), one count of sodomy of a person under the age of 18 years (*id.*, § 286, subd. (b)(1)), one count of oral copulation of a person under the age of 18 years (*id.*, § 288a, subd. (b)(1)), and one count of unlawful sexual intercourse with a minor more than three years his junior (*id.*, § 261.5, subd. (c)). The jury found him guilty of the last

three counts, but was unable to reach verdicts on the remaining 18, leading the court to declare a mistrial as to those counts.[1]

The charges arose out of defendant's relationship with A. The two began dating in or around 2010, when A. was 16 years old and defendant was 24. While dating, the couple engaged in consensual sex. In 2011, while on juvenile probation, A. moved in with defendant and his sister. A. testified defendant became increasingly abusive. She also claimed he held her prisoner in his bedroom for over a month between late March and early May 2011. A. stated defendant left the door unlocked and was gone for hours during the day, but claimed defendant threatened to kill her if she left. During this time, A. testified, defendant assaulted and sexually abused her, repeatedly forcing her to engage in anal intercourse and oral copulation against her will. Several days after A. left the apartment in May 2011, she turned herself in to her probation officer and reported the abuse.

On cross-examination, A. admitted she updated her Facebook account and made calls from her cell phone during the relevant time period. She also admitted to recanting her allegations of sexual and physical abuse against defendant at the preliminary hearing.

Over defendant's objections, the jury also heard testimony from Y., who had dated defendant in 2007, when she was 17 years old. Like A., Y. claimed defendant was physically and sexually abusive. According to Y., defendant threatened and choked her on a number of occasions, anally raped her twice, and forced her to orally copulate him about 10 times. Y. also claimed that, in November 2008, defendant grabbed her by the neck, pressed her face into a pillow, and sodomized her. After the incident, Y. told police defendant had physically attacked her, but she did not report any kind of sexual abuse. Sometime thereafter, Y. ended the relationship and obtained an emergency restraining order against defendant.

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[1] After the jury returned a verdict, the information was amended to include one count of infliction of injury on a cohabitant in violation of Penal Code section 273.5, subdivision (a). Defendant pled no contest to that count, as well as to assault by means likely to produce great bodily injury.

Defendant's sister, who lived with him during the relevant time period, disputed A.'s and Y.'s accounts. She testified she never saw defendant physically assault A. or Y. Nor did she observe any injuries or physical signs of abuse. Defendant's sister also stated A. was not confined to defendant's bedroom and moved freely around the apartment. Likewise, Jacklyn Reliford testified she twice visited defendant and A. at the apartment during the relevant time period, and A. appeared uninjured and did not exhibit signs of distress.

## II. DISCUSSION

Defendant argues his conviction must be reversed because the trial court erred in admitting evidence of uncharged sexual crimes against Y. We find the court properly exercised its discretion, and in all events, any error was harmless.

Evidence of prior criminal acts is generally inadmissible to show the defendant's propensity to commit the charged offense. (Evid. Code, § 1101, subd. (a).) The Legislature has carved out an exception to this rule for evidence of a defendant's commission of another sexual offense or domestic violence. (Evid. Code, §§ 1108, subd. (a), 1109, subd. (a)(1).) However, such evidence is still subject to Evidence Code section 352, which states a trial court has the discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." We review the trial court's decision to admit evidence under section 352 for abuse of discretion (*People v. Harris* (1998) 60 Cal.App.4th 727, 736–737), and we will not disturb that decision on appeal except "on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice" (*People v. Jordan* (1986) 42 Cal.3d 308, 316).

In this context, the principal factor affecting the probative value of an uncharged sexual offense or act of domestic violence is its similarity to the charged offense. (*People v. Johnson* (2010) 185 Cal.App.4th 520, 531.) On the other side of the scale, prejudice exists if the evidence creates an emotional bias or causes the jury to prejudge the

defendant on the basis of extraneous factors. (*People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1115.) Factors considered in assessing the prejudicial nature of the evidence are (1) "whether the propensity evidence is stronger and more inflammatory than evidence of the defendant's charged acts"; (2) "whether the uncharged conduct is remote or stale"; (3) "whether the propensity evidence is likely to confuse or distract the jurors from their main inquiry, e.g., whether the jury might be tempted to punish the defendant for his uncharged, unpunished conduct"; and (4) "whether admission of the propensity evidence will require an undue consumption of time." (*Id.* at p. 1117, citing *People v. Harris*, *supra*, 60 Cal.App.4th at pp. 738–740.)

We find no abuse of discretion here. As an initial matter, the evidence concerning defendant's sexual assault of Y. was similar to, and thus probative of, the charged crimes against A. Defendant was in a relationship with both Y. and A. while the two women were underage, and both women assert defendant assaulted them during the course of their relationship. The nature of the charged and uncharged crimes were also similar. For example, both Y. and A. asserted defendant forced them to engage in anal intercourse and to orally copulate him. Defendant argues the probative value of the prior misconduct evidence was diminished because A.'s account was inconsistent and her credibility severely compromised. He asserts the prosecution introduced Y.'s testimony in order to inflame the passions of the jury because it could not prove its case beyond a reasonable doubt. However, one of the purposes of admitting evidence of previous like offenses in this context is to assist the jury in adjudicating such credibility contests, which are often inevitable in cases of sexual abuse and domestic violence. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1313.) Moreover, we cannot conclude A.'s claims were any more or less credible than Y.'s.

We also find the probative value of Y.'s testimony was not substantially outweighed by the risk of prejudice. A.'s claims were at least as inflammatory as Y.'s, since A. alleged defendant kept her prisoner in his bedroom for several weeks. Further, only three years separated the incidents of violence described by A. and Y. Y.'s testimony may have consumed a great deal of time, as it takes up almost 150 pages of the

trial transcript, but the jury's failure to reach a verdict on any of the 18 counts involving violence, threats, and forcible sex acts strongly suggests this evidence did not cause any confusion.

Even if the trial court did err in admitting evidence of the uncharged crimes, that error was harmless since it was not reasonably probable defendant would have received a more favorable result had Y.'s testimony been excluded. (See *People v. Walker* (2006) 139 Cal.App.4th 782, 808.) Y.'s testimony suggested defendant had a propensity to engage in domestic violence and forcible sex acts. Nevertheless, the jury failed to reach a verdict on the counts of rape, forcible sodomy, forcible oral copulation, assault, criminal threats, and false imprisonment, and it found defendant guilty only of the sexual charges stemming from A.'s status as a minor. Defendant argues the jury must have convicted him on the statutory rape counts based solely on Y.'s testimony. Defendant reasons A. had no credibility in the eyes of the jury, while Y. had lived a responsible life and was engaged in a career at the time of the trial. But as reflected by the the verdict, the prosecution's case on the charges for sodomy and oral copulation of a person under 18 years old and unlawful sexual intercourse with a minor was arguably stronger than its case on the other charges. A.'s age was uncontested at trial, as was her claim that she had consensual sex with defendant. Moreover, defendant's own witness—his sister—indicated defendant and A. were in a romantic relationship.

## III. DISPOSITION

The judgment is affirmed.

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Margulies, J.

We concur:

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Humes, P. J.

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Dondero, J.

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